The Required Submission of an ADR Joint Settlement Plan in Civil Cases in the Berrien County, Michigan Trial Court: An Evaluation of Its Impact on Case Disposition Time*

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I. INTRODUCTION

With the introduction in the Michigan House of Representatives of House Joint Resolution F,[1] proposing to unify Michigan's constitutional courts, probate and circuit, into a single level trial court, and with the circulation of proposed new Michigan Court Rule (MCR) 2.410, entitled Alternative Dispute Resolution,[2] Michigan continues to move decisively toward a unified court where alternative dispute resolution (ADR) is strongly encouraged, if not mandated, in civil and family cases.

In 1996 the Michigan Supreme Court authorized six demonstration projects[3] to test various court consolidation schemes. In April of 1996, Berrien County, Michigan was selected as one of the six sites. The demonstration project in Berrien County consolidated the three courts, circuit, probate, and district, into one trial court with three divisions, civil, family, and criminal.

An ADR task force was established to formalize ADR in the civil and family divisions of the new court. In the civil division two objectives were sought. First was to shift the paradigm within which attorneys prepared

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[1] H.J. Res. F, 1999–2000 Leg. (Mich. 1999). Resolution F was introduced by Representatives Richner, Law, Koetje, Patterson, O'Neil, Yoy, Mortimer, Bishop, and Vear, and it was referred to the Committee on Family and Civil Law.

[2] *See* MICH. CT. R. 2.410 (Proposed Rule 1999), *reprinted in* DISPUTE RESOL. TASK FORCE, MICHIGAN SUPREME COURT, REPORT TO THE MICHIGAN SUPREME COURT (1999) [hereinafter DISPUTE RESOL. TASK FORCE].

[3] *See* JAMES H. BRICKLEY, MICHIGAN SUPREME COURT, JUSTICE IN MICHIGAN: A PROGRAM FOR REFORMING THE JUDICIAL BRANCH OF GOVERNMENT: A REPORT TO THE PEOPLE OF MICHIGAN FROM THE MICHIGAN SUPREME COURT 9 (1995).

their cases from trial preparation to preparing cases for settlement. Second was to use a focus on settlement and ADR as a means of shortening the time from filing to disposition. In addition to these objectives, other incidental benefits were expected such as cost savings and increased litigant satisfaction. This evaluation proposes only to measure empirically the second objective of the project, to shorten case pending time. Anecdotal information has been obtained from interviews with judges and attorneys as to whether the new procedure has had an effect on the first objective of paradigm shifting as well as any other benefits the new system may have produced.

To achieve these objectives, a uniform scheduling order was developed that requires the submission of an ADR settlement plan by the attorneys.[4] The settlement plan provision stipulates that the attorneys agree on an ADR method of their choosing to be employed in the case. If they cannot agree, the court will designate an ADR method for the case. Several methods are outlined on the order but are not exclusive. Other agreed upon methods, although not listed, may be used. Each attorney is given a list of ADR providers (mediators, arbitrators, and neutral evaluators) that is also not exclusive. The order is issued fourteen to thirty days after the answer is filed, and the ADR settlement plan is due twenty-one days from issuance of the order. The scheduling orders are issued by the judges sua sponte.

II. REVIEW OF SIMILAR EVALUATIONS

The federal district courts have accumulated and analyzed a significant amount of data on court procedures that require the use of ADR in civil cases. The Civil Justice Reform Act of 1990 (CJRA) designated several pilot districts to establish ADR programs in their courts and authorized others to voluntarily create such programs.[5] The Act further provided for the collection of data and the eventual evaluation of the programs.[6]

State courts have, to varying degrees, developed court-based ADR programs. Many, if not most, of those programs were initiated at the local level with limited funds and expertise. The result has been that the available human and financial resources were used solely to get the projects established. Data collection and eventual evaluation of the programs were

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[4] For an example of the scheduling order, see *infra* app. at 200-06.

[5] *See* Civil Justice Reform Act of 1990 § 1, 28 U.S.C. § 471 note (1994 & Supp. II 1996) (Pilot Program).

[6] *See id.*

rarely planned for or achieved. Any evaluations of these state programs has been done after the fact and funded in whole or in part by grants.

The State Justice Institute has participated in several evaluations and has published a manual to assist local courts in evaluating court based ADR programs.[7] The guide is helpful and comprehensive but funding and staffing the data collection and evaluation components remain problematic for local courts. The obvious result is that ADR programs are being established with little knowledge of what has been successful in similar jurisdictions. Researchers and ADR scholars operate under the same disability; there is a proliferation of ADR programs in state courts across the country whose effectiveness is only erratically and anecdotally reported.

There are numerous articles discussing the effectiveness or lack of effectiveness of the federal programs established pursuant to the CJRA. The Rand Institute for Civil Justice conducted an evaluation of the federal program, studying four mediation and two neutral evaluation programs.[8] Their findings indicated that although there was general satisfaction with the use of ADR among attorneys and litigants, cost and delay issues were not impacted positively or negatively.[9] This conflicts with the results of court-annexed arbitration studies in North Carolina, Hawaii, and Nevada, all indicating that the arbitration programs implemented had a positive impact on delay reduction, cost containment, and litigant satisfaction.[10]

For ADR to be effective as a means of resolving disputes after they have been filed in courts, and as a vehicle to reduce delay in court dockets, it must be employed in those cases. The two extreme approaches to this dilemma are to order all cases to an ADR program and, on the other extreme, to let the lawyers and litigants make that election on their own

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[7] *See generally* MELINDA OSTERMEYER & SUSAN L. KEILITZ, STATE JUSTICE INST., MONITORING AND EVALUATING COURT-BASED DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR JUDGES AND MANAGERS (1997) [hereinafter OSTERMEYER & KEILITZ].

[8] *See* Elizabeth Plapinger, *Rand Study of Civil Justice Reform Act Sparks Debate*, NAT'L L.J., Mar. 24, 1997, at B18 (citing JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996)); *see also* Darryl Van Duch, *Case Management Reform Ineffective, CJRA Report Says*, NAT'L L.J., Feb. 3, 1997, at A6.

[9] *See* Plapinger, *supra* note 8, at B18.

[10] *See* John Barkai et al., *Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience*, 14 JUST. SYS. J. 133, 155 (1991); Stevens H. Clarke et al., *Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigant Satisfaction*, 14 JUST. SYS. J. 154, 179–81 (1991); Sophia I. Gatowski et al., *Court-Annexed Arbitration in Clark County, Nevada: An Evaluation of Its Impact on the Pace, Cost, and Quality of Civil Justice*, 18 JUST. SYS. J. 287, 301–02 (1996).

with court encouragement. Advocates of ADR maintain that voluntariness is a key element to the success of any ADR method.[11] Any compromise on the voluntariness issue compromises the entire process.

Professor Eric D. Green has questioned the wisdom of annexing ADR programs to courts as a possible compromise on the voluntariness of the process.[12] This, he asserts, occurs without the second step of being court ordered.[13] Professor Green's critique is directed toward the CJRA programs.[14]

Proponents of ordering ADR assert that exposure to these processes can be accomplished best by ordering their use.[15] Successful results from court-ordered experiences will result in future voluntary use.

Although the Berrien County Trial Court process is *ordered* in the sense that an ADR joint settlement plan is required in each case, the method used can be selected from an extensive, nonexhaustive list that includes the required "Michigan Mediation" late evaluation method among the choices available.[16] The order to select an ADR method could be satisfied by selecting the ADR method in which the court rule requires

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[11] *See, e.g.*, Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 267–68 (1996).

[12] *See* Eric D. Green, *Voluntary ADR: Part of the Solution*, TRIAL, Apr. 1993, at 35, 36.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See* MICH. CT. R. 2.403. This Rule makes "[m]ediation of tort cases . . . mandatory" and allows the court to "submit to mediation any civil action in which the relief sought is primarily money damages or division of property." *Id.* at 2.403(A)(1)–(2). The mediation referred to here is an evaluation panel of three "mediators," one chosen from a plaintiff's list, one from a defendant's list, and one from a list of neutral mediators. *See id.* at 2.403(D)(1). This Rule was in effect prior to the adoption of the Michigan Court Rules of 1985. *See id.* at 2.403 staff comment. Cases are submitted "no earlier than 91 days" after the answer is filed and the hearing is set "at least 42 days" after the hearing notice is sent. *Id.* at 2.403(B)(1), (G)(1). The evaluation is due from the mediators within 14 days after the hearing. *See id.* at 2.403(K)(1). Parties must accept or reject the evaluation within 28 days after service of the panel's evaluation. *See id.* at 2.403(L)(1). A rejecting party must pay actual costs if a verdict is less favorable to the rejecting party than the evaluation would have been. *See id.* at 2.403(O)(1). This process traditionally has occurred near the trial date. *See id.* The effect of this long-standing process on the ADR joint settlement plans in the new Berrien County Trial Court scheduling order will be discussed later. *See infra* Parts III, V, VII.

litigants to participate. This was a deliberate action taken by the Berrien County Trial Court to soften the impact that ordering a joint settlement plan might otherwise have had.

III. BACKGROUND TO THE BERRIEN COUNTY PROCESS

Scheduling orders were used in the Berrien County Circuit Court by its circuit judges in 1995. Separate scheduling orders were designed by each of the four judges handling civil cases and were issued by each of them as they deemed appropriate. These orders ranged in length from one to four pages and scheduled events such as the following: adding of parties, joinder of parties and claims, exchanging of exhibits, physical examination of witnesses, naming of experts, deposing of witnesses, scheduling of motions, filing of briefs, mediation, pretrial, settlement conference, close of discovery, submitting proposed jury instructions, and trial dates. The mediation referred to and scheduled in these orders is the Michigan Mediation neutral evaluation required pursuant to MCR 2.403.[17] Any mediations (neutral evaluations) conducted in the case sampling from 1995 were done pursuant to a scheduling order. Twenty-five scheduling orders were issued, and twenty-one mediations (neutral evaluations) were ordered.

The four circuit judges hearing the civil docket in 1995 also were responsible for all felony trials and all domestic relations cases. Each judge assumed responsibility for one-fourth of all civil filings, all felony trials, and all domestic relations cases.

The Berrien County Trial Court demonstration project made several modifications to the case processing procedures formerly in effect. As discussed earlier, the project combined the former circuit, probate, and district courts into a single court with civil, family, and criminal divisions.[18] The civil division became responsible for all civil filings from both the former district and former circuit courts. The former district court heard all small claims actions, landlord and tenant cases, and civil cases where the amount in controversy was less than $10,000. The former circuit court heard all equitable matters and civil cases where the amount in controversy exceeded $10,000. The civil division of the Berrien County Trial Court is responsible for all of these cases.

Two judges are assigned to the civil division of the Berrien County Trial Court. The rationale for this format is that the assigned judges' time

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[17] *See* discussion *supra* note 16.

[18] *See supra* note 3 and accompanying text.

will be devoted exclusively to civil matters and not divided among other types of cases, bringing both devotion and expertise to the area.

The scheduling order that was developed for use in the civil division of the Berrien County Trial Court and its modifications were agreed upon by both judges of the civil division. It is a uniform order issued in similar circumstances by both judges.[19] This order is issued in general civil cases that were formerly cases filed in the circuit court. With limited exceptions, the general civil cases that were filed in the former district court, those nonequitable cases involving less than $10,000, are processed by the judges differently.[20] For that reason, and because they were processed in a separate court prior to the demonstration project, they have been excluded from this evaluation.

The scheduling order is issued two weeks from the date of the filing of the answer, although in the 1997 sample cases they were filed on average 183 days from the filing of the complaint.[21] The process involves the judge reviewing the file and setting appropriate dates for the completion of events. This depends on the apparent complexity of the case. The attorneys are not consulted at this point. The scheduling orders are issued sua sponte by the judges.

The dates that the judge sets in the scheduling order are as follows: ADR joint settlement plan, joinder of claims and parties, physical examination, disclosure of experts, depositions of experts, disclosure of rebuttal experts, depositions of rebuttal experts, settlement conference, and

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[19] The order appears in the Appendix. *See infra* app. at 200–06. Since the inception of the demonstration project, one of the two assigned civil division judges has remained with the civil division. The second judge assignment has changed. To date four different judges have served in that position. The 1997 case sampling has been managed by at least three of those judges. Although the procedures of the civil division have made these transitions nearly seamless, they have occurred nonetheless.

[20] Effective January 1, 1999, the jurisdictional limit of district court cases in the State of Michigan was increased to $25,000. *See* MICH. CT. R. 2.111(B)(2). The Berrien County Trial Court civil division judges have prepared a separate scheduling order for these cases that also strongly encourages the use of ADR.

[21] The judges attempt to issue scheduling orders within two weeks from the filing of the answer. That date, they indicated in interview, is not always met. *See infra* notes 37–40 and accompanying text. It constitutes their tickler date. Answers are filed at varying times in cases depending on time of service, number of defendants, and other factors. This evaluation uses the date of filing as the date from which events are measured. This is a practical as well as logical benchmark because the total pendency of a case starts with date of filing and ends with date of disposition. In addition, one of the two civil division judges originally assigned to the civil division did not issue scheduling orders in a timely manner.

trial.[22] Other dates are contained in the standard body of the scheduling order and are dependent on the dates set by the judge elsewhere in the order. Some of these are as follows: ADR joint settlement plan due twenty-one days from date of issuance of the order; pretrial motions are to be filed and heard prior to settlement conference date; expert witness fees exchanged fourteen days prior to settlement conference date; discovery not specifically referred to elsewhere may be conducted until twenty-eight days prior to trial; and jury instructions and verdict forms due twenty-eight days prior to trial.[23]

Adjournments of dates set in the scheduling order may be accomplished by agreement of the attorneys and the judge or by motion.[24] The judges attempt to maintain the trial date initially set as a date certain but take a liberal approach to rescheduling other events.

Included in the scheduling order is a list of ADR methods and a description of each. The list is not exhaustive and includes, as the last item listed, other methods.[25] More than one page of the three and one-half page order is devoted to ADR.[26]

The court also provides each attorney or litigant with a list of ADR providers that is also not exhaustive. Its purpose is to provide access to ADR providers. In addition, the court arranged a twenty-four hour facilitative mediation training course for attorneys. Twenty-five attorneys were trained. Currently there is no certification of arbitrators and civil mediators in Michigan.[27] The Berrien County Trial Court list includes the relevant qualifications of mediators and arbitrators. To be included on the court circulated list, mediators and arbitrators must have actual training or experience.

IV. METHODOLOGY

This evaluation used case history data from computer dockets and case files of selected civil cases to track key events. In addition to the case history data, interviews were conducted of civil division judges and several

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[22] *See infra* app. at 200-01.

[23] *See infra* app. at 200-01.

[24] *See infra* app. at 200-01.

[25] *See infra* app. at 202-06.

[26] *See infra* app. at 202-06.

[27] *See* MICH. CT. R. 2.411 (Proposed Rule 1999) (setting out proposed qualifications and standards of conduct for ADR providers). This Rule is currently being circulated for comment.

attorneys who were significantly involved in the new process. These interviews were conducted to gain perceptions of the success or lack of success of the new process from participants as well as anecdotal information on the perceived strengths and weaknesses of it.

A. *Analysis of Case History Data*

This evaluation compares data from case filings before the new process was instituted with case filings after the project began. The Berrien County Trial Court demonstration project began in October of 1996. Berrien County was designated as a project site in April of 1996. All of the planning necessary to begin the new system occurred between April of 1996 and October of 1996. To avoid any effects from this transitional period, cases for comparison were drawn from a time when they would not have been effected by the new process or the anticipation of it. The cases used are from January and February of 1995. These cases were filed and managed to conclusion, with only a very few exceptions, prior to the planning for the demonstration project in April of 1996.

Comparison cases for the new process were drawn from January and February of 1997. These cases were filed and concluded entirely under the new system. These cases represent the filings from the fourth and fifth month of the project. There was a three month period prior to these filings where participants could adjust to the new process. These cases were old enough to have been concluded before this evaluation started. Seasonal case filing anomalies, if any, exist equally for both samples.

The four sample months, two from 1995 and two from 1997, compare favorably with each other. In January of 1995, thirty-eight cases were filed; no answer was filed in ten of those cases. In February 1995, thirty-two cases were filed; in ten of those, no answer was filed. Of the seventy cases filed in January and February of 1995, the fifty that were contested (at issue) formed the basis of the 1995 sample. In January of 1997, thirty-eight cases were filed. In fifteen of those, no answer was filed. Forty-one cases were filed in February of 1997; no answer was filed in fifteen of those cases. The forty-nine contested (at issue) cases in January and February of 1997 comprised the sample for that year.

The case type mix of the two samples was approximately the same. Each of the 1995 and 1997 contested case samples had twenty-three civil damage suits.[28]

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[28] The cases were divided primarily between civil damage suits, e.g., auto negligence, medical malpractice, personal injury, and other damage suits; and other

The events that were tracked in the 1995 sample were the following: filing date, date a scheduling order was issued, ADR event date, and date of final disposition. In the 1997 sample, the same events were tracked with the addition of the ADR joint settlement plan. The evaluation compares the times between the various events in an effort to determine impact on the case disposition time.

B. *Interviews with Judges and Attorneys*

Interviews were conducted with the two civil division judges, two plaintiff's attorneys, and two defense attorneys. Two of the attorneys also were trained as mediators in the twenty-four hour court-arranged mediator training and had served as facilitative mediators under the new system. One attorney was the local bar association representative who worked with the ADR Task Force of the Berrien County Trial Court and the civil division judges to develop the scheduling order that is being used in the demonstration project.[29]

The interviews were conducted one-on-one and were generally informal in nature. The questions focused on how the new system was working, any changes in trial practice as a result of it, the effectiveness of the ADR joint settlement plan, and the types of ADR methods chosen and reasons for the choice.

The attorneys chosen were all experienced attorneys who specialize in civil litigation. In their combined practices they represented a significant portion of the parties in the civil filings in the sample. As a group, they appeared in eighteen percent of the 1995 sample and thirteen percent of the 1997 sample. The average length of practice for each is twenty-five years.

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civil matters, e.g., business claims, contracts, housing, and real estate. The filings included all classification codes found in MICH. CT. R. 8.117(3), (5), and (6)(f).

[29] The ADR Task Force of the Berrien County Trial Court demonstration project consisted of a judge (the author of this Article), the executive director of the local community dispute resolution program—a mediator, and a local attorney trained in family mediation skills. The goal of the ADR Task Force was to formalize ADR in the civil division of the new Berrien County Trial Court and mediation in the family division of the court. These issues were dealt with separately. Civil division planners, including a local bar association representative, worked with the ADR Task Force to develop the ADR component to the civil division procedures.

V. DISCUSSION OF EVALUATION RESULTS

Any discussion of the effectiveness of an ADR program must begin with a reiteration of the obvious yet most overlooked piece of empirical data. In the fifty cases from the 1995 sample in which answers were filed—cases at issue—three were disposed of by nonjury trial and two were disposed of by the judge granting a motion for summary disposition. Ten percent of the sample was resolved by court action. Of the 1997 sample, forty-nine cases were at issue, three were resolved by jury trial, and three by the granting of summary disposition. Twelve percent were resolved by court action. Court disposition of cases was a seldom-occurring event, and disposition by trial almost never occurred.

The obvious having been restated and confirmed, an examination of the data can be done to find what *does* dispose of cases, and more specifically, whether a focus on ADR brings disposition at an earlier stage.

The average time from filing to disposition of the fifty at issue cases from the 1995 sample was 350.56 days and 387.02 days for the forty-nine cases at issue from the 1997 sample.[30] The average disposition time increased from 1995 to 1997 by 36.46 days. Although telling, these results are somewhat deceptive.

In the 1995 sample, ten cases were resolved in 100 days or less. In the 1997 sample, five cases were resolved in 100 days or less. Scheduling orders were not issued in any of these cases. The issuance of the scheduling order was the first court-initiated action in the 1997 sample cases. This occurred an average of 183 days from the date of case filing. In the 1995 sample, the average time from filing to the issuance of a scheduling order was 237 days. Whether or not the issuance of the scheduling order was the first court-initiated action in the 1995 sample, it is highly unlikely that the court initiated any action on the cases that were disposed of in 100 days or less. In the 1997 sample, the court did not initiate action in the 100 day or less cases. Cases disposed of in 100 days or less from the date of filing were destined to be disposed of quickly and without court intervention.[31]

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[30] *See infra* tbl.1.

[31] Two cases in the 1995 sample were disposed of by the court—one, a motion for summary disposition, was heard and granted in a suit where the defendant did not have an attorney. That occurred in 92 days from filing. It also was preceded by a motion for prejudgment garnishment. A second 1995 suit was for a mutual restraining order and a hearing was held and an injunction issued within 85 days from filing. Although the court was involved in these cases, issues were present that required one or more of the parties to seek unusually fast action from the court.

There are a variety of reasons why this occurs, but overwhelmingly, the cases were settled at an early stage with little, if any, court activity.

When these cases are removed from the database, the average time from filing to disposition between the two samples closes. The average time from filing to disposition of the forty 1995 cases that were pending longer than 100 days was 420 days. The forty-four 1997 cases pending for longer than 100 days averaged 424.7 days from filing to disposition.[32] The 1997 sample took only 4.7 days longer to dispose of than like cases from 1995.

One of the cases in the 1995 sample took 1,421 days to conclude. The next longest disposition time for that sample was 868 days and three cases took longer than 700 days. In the 1997 sample the longest disposition time was 750 days and six cases in that sample took longer than 700 days to dispose.[33] Removing the 1,421-day case from the sample as being an anomaly, the average disposition time for cases pending more than 100 days in the 1995 sample drops to 394.34 days, 30.36 days shorter than the 1997 sample of those cases.

Table 1

Description	Number of Cases	Average Time to Disposition
1995 cases at issue	50 cases	350.56 days
1997 cases at issue	49 cases	387.02 days
1995 cases at issue—pending over 100 days	40 cases	420 days
1997 cases at issue—pending over 100 days	44 cases	424.7 days
1995 cases at issue—pending over 100 days, without 1,421-day case	39 cases	394.34 days

[32] *See infra* tbl.1.

[33] Three cases in the 1997 sample were still pending as of February 21, 1999, the date the data was last collected, and were noted as being disposed of on that date in order to include them in the time calculations. The 750-day-old case was one of the three pending cases.

Various events were tracked, but not all events occurred in all cases. This was true for both the 1995 and the 1997 samples.

The first event that occurred in both samples was the issuance of a scheduling order. The average time from the date of filing to the date of the issuance of the scheduling order in the 1995 cases was 237 days; in the 1997 cases, the average time was 183 days.[34] The scheduling orders were issued an average of fifty-four days earlier in 1997 than in 1995.

Table 2

Description	Number of Cases	Average Time—Date of Filing to Issuance of Scheduling Order
1995 cases in which scheduling order was issued	25 cases	237 days
1997 cases in which scheduling order was issued	37 cases	183 days

In 1995 scheduling orders were sent out in twenty-five of the fifty cases at issue, or fifty percent of the cases. In 1997 scheduling orders were used in thirty-seven of the forty-nine cases at issue, or 75.5% of the cases. The average disposition time for the twenty-five cases from the 1995 sample in which a scheduling order was issued was 526.80 days. If the 1,421-day case is removed, the average drops to 489.54 days. The average duration of the thirty-seven cases from the 1997 sample in which scheduling orders were issued was 413.54 days.[35] There is at least a seventy-six day difference between the two samples.

Sixteen cases from the 1995 sample were pending for over 100 days and had no scheduling order issued. The average duration of those cases was 242 days. The seven 1997 cases pending over 100 days in which no scheduling order was issued averaged 483.7 days in duration, twice as long as similar cases from the 1995 sample.[36]

One possible explanation for this difference might lie in the policies used to issue scheduling orders. If in the 1995 cases, scheduling orders were not issued when it appeared that they would be of short duration with minimal or no court intervention, then the cases in which scheduling orders

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[34] *See infra* tbl.2.

[35] *See infra* tbl.3.

[36] *See infra* tbl.3.

were issued would, by definition, consist of more complex cases requiring more time and effort to bring to conclusion. In the 1997 sample, scheduling orders were issued routinely. In 1997 scheduling orders were issued fifty percent more frequently than in 1995. The result is that in 1997, cases with a naturally short life were included with the more complex cases requiring greater supervision.

The 1995 sample cases in which a scheduling order was issued were disposed of faster when an ADR event was completed.[37] That group of cases was disposed of in an average of 522.62 days, or 477.7 days if the 1,421-day case is eliminated. The four cases in which a scheduling order was issued, but in which no ADR event occurred, averaged 548.75 days in duration.[38] This difference may or may not be significant since there were only four cases in which no ADR event occurred.

Table 3

Description	Number of Cases	Average Time—Filing to Disposition	Percentage of Cases at Issue
1995 cases at issue—scheduling order issued	25 cases	526.80 days	50%
1995 cases at issue—scheduling order issued—w/o 1,421 day case	24 cases	489.54 days	49%
1997 cases at issue—scheduling order issued	37 cases	413.54 days	75.5%
1995 cases at issue, pending over 100 days—no scheduling order issued	16 cases	242 days	32%
1997 cases at issue, pending over 100 days—no scheduling order issued	7 cases	483.7 days	14.3%

[37] As stated earlier, the only ADR event that was scheduled in the 1995 cases was the late neutral evaluation required by MCR 2.403. *See infra* Part III.

[38] *See infra* tbl.4.

The 1997 sample reflects little difference in length of pendency among the cases in which scheduling orders were issued. The completion or failure to complete the subsequent tracked events has little effect on the duration of those cases. Twenty of the thirty-seven cases in which a scheduling order was used completed both the ADR joint settlement plan and the ADR event. The average length of those cases was 416.8 days. In fourteen cases, no ADR joint settlement plan was filed. Those cases were disposed of in an average of 405.71 days. Nine cases did not complete an ADR event. They averaged 404.78 days from filing to disposition. Six cases in which a scheduling order was issued in the 1997 sample completed neither the ADR joint settlement plan nor an ADR event. They were completed in an average of 393 days.[39]

Table 4

Description	Number of Cases	Time-Filing to Disposition
1995 cases at issue—scheduling order and ADR event	21 cases	522.62 days
1995 cases at issue—scheduling order and ADR event, w/o 1,421-day case	20 cases	477.7 days
1997 cases at issue—scheduling order, ADR joint settlement plan, and ADR event	20 cases	416.8 days
1997 cases at issue—scheduling order, no ADR joint settlement plan	14 cases	405.71 days
1997 cases at issue—scheduling order, no ADR event	9 cases	404.78 days
1997 cases at issue—scheduling order, no ADR joint settlement plan, and no ADR event	6 cases	393 days

In both the 1995 and 1997 samples, approximately fifty percent of the cases in which an ADR event occurred were disposed of within ninety days of that event. Within 120 days of the ADR event, seventy-nine percent of the 1997 cases in which ADR was conducted were disposed. In the 1995

[39] *See infra* tbl.4.

sample, the percentage of dispositions within 120 days of the ADR event was sixty-two percent.[40] It is difficult to assess accurately the effect of the ADR events on the ultimate disposition of the cases because there is no data available to determine the time spent on out of court events such as post-ADR event settlement negotiations, preparation of settlement documents, and the filing of those documents with the court. The presiding civil division judge expressed the opinion that ultimately all settlements are affected by the ADR event when ADR is used.

Table 5

Days from ADR Event to Disposition of Case	Number of Cases Disposed of : Total ADR Cases	Percentage of ADR Cases
1995		
30	5 : 21	24%
45	6 : 21	28%
60	8 : 21	38%
90	11 : 21	52%
120	13 : 21	62%
1997		
30	4 : 29	14%
45	8 : 29	27.5%
60	10 : 29	34.5%
90	15 : 29	51%
120	23 : 29	79%

VI. INTERVIEWS WITH JUDGES AND ATTORNEYS

A. *The Judges*

The civil division of the Berrien County Trial Court is staffed by two judges who devote all of their time to managing the civil docket for the court. That includes small claims, landlord and tenant, general civil cases of any dollar amount, and all equitable matters other than domestic relations issues. One of the two civil division judges interviewed has been in the civil division since the inception of the demonstration project in October of 1996. She is the presiding judge of the division. The second

[40] *See infra* tbl.5.

civil division judge is the fourth judge in that position since October of 1996.[41]

Both judges were of the opinion that the concept of a civil division with judges devoted only to civil matters was working well and was received well by the bar and public.[42] The problems experienced by the attorneys and the public resulted from unresolved issues that arose inevitably from the consolidation of the courts to form the trial court.

The presiding judge of the civil division was a principal in drafting of the scheduling order and its subsequent modifications (which, she related, were few since October of 1996). The judges were of the opinion that generally the order was working.[43] That is, it was being complied with and was settling cases in a timely manner. They did not have an opinion as to whether the scheduling order and its ADR settlement plan requirement had moved cases through the system faster, but they expressed no problems with backlogs.[44]

The judges indicated that, by far, the most often chosen ADR method was the traditional Michigan Mediation neutral evaluation as outlined in MCR 2.403. They indicated that facilitative mediation was being used on an increasing basis as was, to a lesser extent, arbitration. They also noted an increase in the use of experts on the neutral evaluation panels.[45] The presiding judge of the civil division said that at the beginning of the project, when attorneys did not submit an ADR joint settlement plan, she nearly always ordered the Michigan Mediation neutral evaluation required in MCR 2.403. She expressed concern that this event occurs late in the process—late neutral evaluation—resulting in a greater amount of discovery being conducted prior to the event.[46]

The judges indicated that settlement conferences were effective in settling cases.[47] A review of the data discloses that only two of the 1997 sample had disposition dates that relate to the settlement conference date. One of those showed a disposition date one day after the settlement conference date and the other was twenty-four days after that date. There were seven cases from the 1997 sample that showed disposition dates

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[41] *See* Interviews with Anonymous State Court Judges, in Berrien County, Mich. (Mar. 5, 1999).

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See id.*

ranging from two days prior to trial to fourteen days after the scheduled trial date.[48] Clearly the trial date influenced the date of disposition more than the settlement conferences.

The judges felt that the ADR joint settlement plan requirement caused attorneys to modify their pretrial discovery. They were of the opinion that lawyers were gathering information, through deposition or otherwise, that would benefit them in the settlement process first and deferring other discovery items to a later time.[49]

Adjournments of pretrial deadlines were frequently given, the judges said, but they were reluctant to adjourn trial dates from the dates first set on the scheduling orders.[50]

Both judges expressed concern that in an increasing number of cases, defense counsel had no authority to settle, forcing those cases to trial. They attribute this to instructions from insurance carriers as opposed to resistance to settlement on the part of the attorneys.[51]

B. *The Attorneys*

"Lawyers are like cockroaches," the first plaintiff's attorney (Attorney P-1) said in response to a question regarding the effect of the court's new scheduling order on the bar.[52] He went on to develop a rather astute analogy. Both cockroaches and attorneys have been around for thousands of years and have changed little in that time. They both have learned to adapt to changing environments without themselves changing. Just as there will always be cockroaches, there will always be lawyers—people who speak for other people. Attorney P-1's analogy set the tone, not just for his interview, but for the interviews of the other attorneys that would follow. It

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[48] Several cases show disposition dates greater than 14 days after the scheduled trial date, but the impact of the trial date cannot reasonably extend much beyond a short period after the scheduled trial—a period long enough to accommodate final details of settlement and preparation of paperwork. Those times were from 33 days after the scheduled trial date to 268 after trial date and comprised six cases. All cases that had disposition dates after the scheduled trial date and which were not tried represent cases where the trial was adjourned.

[49] *See* Interviews with Anonymous State Court Judges, in Berrien County, Mich. (Mar. 5, 1999).

[50] *See id.*

[51] *See id.*

[52] Interview with Attorney P-1, in Berrien County, Mich. (Mar. 17, 1999). Attorney P-1 is a medical malpractice attorney and assisted the court in preparation of the scheduling order as the representative of the bar.

also very adeptly describes the reaction of the bar to the procedural modifications made by the court.

Attorney P-1 felt that the effort to increase the use of ADR by requiring the submission of an ADR joint settlement plan was largely unsuccessful.[53] The tendency of most lawyers in most cases is to opt for the traditional Michigan Mediation neutral evaluation as required by MCR 2.403. This election allows cases to be prosecuted in the same manner they were prior to the demonstration project. He did feel that facilitative mediation was a very promising alternative. He had made the election for facilitative mediation in at least three cases he could recall quickly—two produced satisfactory results. He attributes the success or failure of facilitative mediation to the quality of the mediator.[54] The attorneys are just beginning to learn which mediators are effective and which are not. Attorney P-1 has also used arbitration and has acted as an arbitrator in other cases.[55]

Attorney P-1 indicated that the case management decisions of the insurance carriers have had a greater effect on his practice than the changes made by the court.[56] Most carriers will not agree to arbitration or facilitative mediation unless they are contractually bound to do so by their policy with their insured. In addition, many are instructing their attorneys not to settle certain cases but to take them through trial. This decision is made very early and is not departed from through the course of the case.[57]

Although the scheduling order and its ADR joint settlement plan provision has had little effect on his practice, Attorney P-1 did indicate that he has altered the way he proceeds with discovery. Now he "cuts to the chase," as he termed it, in his discovery.[58] He gets the information he needs to intelligently discuss settlement.[59]

In Attorney P-1's opinion, the scheduling order risks being undermined because the judges liberally extend the dates set in it. The easier it is to get extensions, the greater the tendency to request them. He sees the tendency toward more requests for relief from the dates set in the order.[60]

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[53] *See id.*

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] *See id.*

[58] *Id.*

[59] *See id.*

[60] *See id.*

The first defense attorney interviewed (Attorney D-1) indicated that although some attorneys were of the opinion that the scheduling order was issued too early and that the ADR joint settlement plan required settlement decisions to be made too early in the process, he was not of that opinion.[61] Attorney D-1 stated that he is a believer in ADR and early settlement. The sole purpose of ADR, in Attorney D-1's view, is to save money that is otherwise spent on trial preparation. Therefore, he feels that it must occur early in the process. Many attorneys approach ADR as the ultimate trial of the issue and attempt to prepare their case completely as though they were going to trial, Attorney D-1 observed. This, in his opinion, defeats the purpose of ADR.[62]

Attorney D-1 has served as a mediator in facilitative mediations under the new system and has had his cases mediated. He indicated that to be effective, facilitative mediators in tort cases need to take a firm position with the parties. The mediator needs to tell parties what the flaws of their cases are. He has had both positive and negative experiences with the facilitative mediation process. The mediator's skills are the sole factor in making the experience a good one in Attorney D-1's opinion.[63]

Early case development, in terms of preparation for negotiating settlement, have always been part of Attorney D-1's case management philosophy, and therefore his practice has not changed under the new system. This is also becoming a management philosophy of some of the insurance carriers. Others, Attorney D-1 reports, are taking a more rigid position with cases referred to his firm. They give directives to litigate the case through trial with no settlement authority.[64]

Attorney D-1 indicated that lawyers are constantly adapting to the various changes of the courts and the policies of their clients and are able to assimilate new procedures as they are implemented.[65]

Attorney P-2, the second plaintiff's attorney interviewed, offered some interesting insights into the workings of the insurance carriers as they relate

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[61] *See* Interview with Attorney D-1, in Berrien County, Mich. (Mar. 19, 1999). Attorney D-1 is a partner in a long-established law firm that has an extensive insurance defense practice. Attorney D-1 participated in the court-arranged mediator training and has mediated several cases under the new system. A smaller portion of his practice is devoted to plaintiff's litigation and a wide variety of general civil matters that require litigation.

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

to the carriers' case management decisions.[66] He indicated that he is able to settle many of his cases before a suit is filed by doing early preparation and working with the insurance carrier's claims personnel. For many companies, he asserts, this is the preferred method of handling their claims.[67]

Attorney P-2 feels that the ADR joint settlement plan is not making much of a difference in the way cases are prosecuted through the system. The joint settlement plan provision allows the Michigan Mediation neutral evaluation required by MCR 2.403 as an option; therefore, Attorney P-2 says, the simplest way to satisfy the requirement is to choose that option. The case then is managed as it had always been. He did indicate that the fact that the scheduling order was a uniform order helped him in his practice. He stated that it is very difficult to keep up with the various differences from county to county and the fact that all cases in Berrien County are managed the same was a positive for the system; attorneys know what to expect.[68]

Attorney P-2 has used other forms of ADR, more in other jurisdictions than in the Berrien County Trial Court. He indicated that arbitration has been used effectively as has facilitative mediation. He, as the other interviewees, indicated that the quality of the mediators in facilitative mediation is the critical factor. He looks for a mediator who can assertively, perhaps even forcefully, assist the parties in negotiating a settlement.[69]

In his experience, Attorney P-2 observed that the corporate position of insurance companies is generally against using ADR, even when they have provisions in their policies that give them the option to arbitrate or use other alternate means to resolve the dispute. He has had cases where arbitration clauses have appeared in insurance policies and where he has elected to use arbitration, but the insurance carriers have refused, opting for the traditional trial. Corporate case management decisions of the insurance carriers drive the defense bar, in Attorney P-2's opinion, more so than any court's procedural practices.[70]

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[66] *See* Interview with Attorney P-2, in Berrien County, Mich. (Mar. 23, 1999). Attorney P-2 is a partner in a personal injury law firm that does significant work in Berrien County and across the state.

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See id.*

Because he is settling many cases prior to filing suit, the early ADR requirements do not effect his trial preparation practices. He already has the necessary discovery completed when his suit is filed.[71]

In a final comment, Attorney P-2 indicated that he appreciates the fact that the civil division judges in Berrien County are devoted solely to civil cases but did not feel that cases moved through the system more quickly as a result.[72]

For facilitative mediation to work, the mediator needs to be a "hard-nosed negotiator" as opposed to a "tea-pouring facilitator," were the words of the second defense attorney (Attorney D-2) interviewed.[73] Ninety percent of the cases subject to the Berrien County Trial Court's scheduling order opt for the Michigan Mediation neutral evaluation required by MCR 2.403, according to Attorney D-2. Although he has mediated several cases as a facilitative mediator and participated as attorney for a party in several others, he detects a downturn in its use. As his earlier statement indicates, Attorney D-2 feels that the qualities of the mediator are all important to the success of a facilitative mediation.[74]

Arbitration, in Attorney D-2's experience, is used generally only when a contract provision so requires.[75]

With regard to the scheduling order generally, Attorney D-2 felt that because it was a standard form and is issued in all cases, it is used inappropriately in many cases. He used the example of an appeal to the court of an administrative agency decision—zoning board of appeals. In those cases, Attorney D-2 felt that ADR was totally inappropriate and even inapplicable. He based his position on the fact that an appeal of an agency decision was strictly a legal matter requiring the court to make legal determinations.[76]

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[71] *See id.*

[72] *See id.*

[73] Interview with Attorney D-2, in Berrien County, Mich. (Mar. 25, 1999). Attorney D-2 is a partner in an insurance defense firm which represents many insurance companies from time to time, ten regularly and three very significantly. In addition to their office in Berrien County, Attorney D-2's firm also maintains an office in Kent County, Michigan. Attorney D-2 participated in the court-arranged mediator training and has mediated several cases under the new system.

[74] *See id.*

[75] *See id.*

[76] *See id.* Interestingly, Attorney D-2 was not aware of the Michigan Court of Appeals' ADR program. *See generally* DISPUTE RESOL. TASK FORCE, *supra* note 2. The Michigan Court of Appeals implemented a mandatory mediation program in January of 1998 after having conducted a successful pilot program. This is mentioned

Working exclusively for a defense firm, Attorney D-2 indicated that he is very much subject to the corporate decisions made by his clients. He cited examples of receiving instructions from carriers, when cases are assigned, to not communicate with the carrier until he can report the verdict, and they expect that it will be a "no cause." He indicated that he exaggerated little in that scenario. Case evaluations, he states, are done at the corporation level and when cases are assigned to outside counsel such as his firm, decisions are already firmly made as to how much if anything will be paid for a claim. He has little authority or ability, in many instances, to control the disposition of a case. The decision to take a case to trial, Attorney D-2 states, is made in part by the assessment of whether the carrier feels the plaintiff is likely to get a verdict, or if so, a large verdict in a particular jurisdiction.[77] Berrien County, being generally conservative in that regard, is a jurisdiction where cases may be tried more often. This sentiment was also expressed by the other attorneys interviewed.

Cost containment seems to be the driving force behind the insurance carriers, according to Attorney D-2. He had limited information on cases being settled prior to filing because his firm only gets the cases when a complaint has been filed.[78]

Self-insured clients, Attorney D-2 observed, are becoming more assertive in the management of their claims. They are less likely today to defer to his professional judgment than in the past.[79]

These challenges are more of a concern to him than the changes a court may implement. What Attorney D-2 does desire from courts is the ability of judges to understand the subject matter and to appreciate his position as a practicing attorney. This is something that he views as a problem generally with Michigan judges but did not see this as a problem in Berrien County.[80] This is partly due to the inevitable specialization that occurs when judges devote all of their time to civil matters.

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more to point out the fact that attorneys are indeed, as Attorney P-1 pointed out, survivors who devote many long hours to simply surviving. *See* Interview with Attorney P-1, in Berrien County, Mich. (Mar. 17, 1999). This illustrates how important it is for judges and court administrative personnel to appreciate the issues confronted by attorneys in their practices. Attorney D-2's interview was conducted at 7:30 a.m. and was delayed while Attorney D-2 telephonically addressed office matters with personnel in his Grand Rapids office.

[77] *See* Interview with Attorney D-1, in Berrien County, Mich. (Mar. 19, 1999).

[78] *See id.*

[79] *See id.*

[80] *See id.*

VII. CONCLUSIONS

A comparison of two months of cases from 1995, prior to the Berrien County Trial Court's ADR joint settlement plan requirement and two months of cases from 1997, when the settlement plans were required, reveals no significant change in the rates at which cases are disposed in Berrien County, Michigan.

Some differences in disposition rates did appear that deserve discussion. The seventy-six day difference between the time of pendency of the 1995 cases in which a scheduling order was issued and the 1997 cases using scheduling orders is significant. There are possible explanations. In 1997 over seventy-five percent of the cases that were at issue had scheduling orders filed, compared to fifty percent of the same cases in 1995. In addition, sixteen cases that were at issue in 1995 were not sent scheduling orders, but only seven cases in 1997 were not issued orders. The sixteen were disposed of in half the time as the seven from 1997. Of the sixteen cases from the 1995 sample that had no orders, only four were pending longer than 270 days (nine months), and none were pending longer than 436 days. The 1995 sampling of cases contained five cases that remained pending after 700 days; all were issued scheduling orders. In the 1997 sample, six cases were pending longer than 700 days, three were issued orders; three were not. Some of the cases that received scheduling orders in 1997 perhaps should not have been issued orders, and some of those that did not receive an order perhaps should have. This scenario would have helped even disposition time between the two years' samples. This scenario would also indicate that the judges need to give closer review of files prior to issuance of scheduling orders.

Well-managed cases move more quickly than cases that are not managed well. This appears to hold true for both case samples.

There is a point after which effort to shorten the time a case remains at issue in a court produces negligible results. The judges and attorneys interviewed made comments of a more tangential nature indicating that parties need time to develop their cases in order to bring them to a close. If that process does not begin until a complaint is filed, then attempts to shorten it are futile. The Michigan Supreme Court recognized this in an administrative order on caseflow management, and specifically, the section "Time Guidelines for Case Processing" requires courts to conclude seventy-five percent of civil cases "within 12 months of filing, 95% within

18 months" of filing, "and 100% within 24 months" of filing.[81] The Berrien County Trial Court has not met this objective in 1997, nor had the court in 1995, but in both instances those timelines are very nearly met.[82] Perhaps, the limit has been reached. It may be that the Michigan Supreme Court's order has articulated a timeframe as policy that mirrors what is in practice the fastest rate at which cases can be completed. Case preparation is time consuming. Basic discovery events such as physical examinations and identifying and deposing experts take time.

ADR's effectiveness is as a case management tool. To be effective in reducing the time that cases remain pending, it must be used in conjunction with other tools and at an early stage of the proceedings. The appropriate method must be employed in each case. By allowing the traditional Michigan Mediation late neutral evaluation per MCR 2.403 as an ADR option, the Berrien County Trial Court, in an effort to introduce a new concept, ensured that little change from the status quo would occur and that ADR would occur late in the process.

From a more optimistic perspective, the now archaic but once progressive attempts at ADR that have become entrenched in the Michigan civil trial practice have been effective. Cases conclude at a high rate within a relatively short period of time after the late neutral evaluation in MCR 2.403. It is unfortunate that the neutral evaluation procedure was termed "mediation" and that it was designed to occur late in the process. Efforts appear to be underway to correct these problems.

Mediation in its true form needs to be revisited as it is attempted to be used in civil injury and damage cases. These cases comprise fifty to sixty percent of the cases in the samples. The attorneys interviewed were unanimous in their desire that the process move from neutral reframing of issues and reality testing to assertive neutral assessment and evaluation of positions. That is not to conclude that traditional facilitative mediation is not valid. It should only be employed where appropriate. A variation of it, perhaps by a different name—facilitated negotiation as an example—should be developed as a separate means of resolving disputes.

Notably, there was virtually no discussion of ADR methods such as the mini-trial, summary jury trial, and early neutral evaluation among those interviewed. There was also no evidence that any of these methods were employed in the sample cases, although the ADR method employed was not

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[81] Order Regarding Caseflow Management, Admin. Order No. 1991-4, Mich. Reports A 1-53, A 1-54 to A 1-55 (1991). This section does allow exceptions if "exceptional circumstances" are determined to exist. *See id.* at A 1-53(C)(1).

[82] This statement is based on the two month sampling only.

specifically tracked in the court records except to docket the MCR 2.403 Michigan Mediation hearing date.

The apparent impact of the decisions of insurance carriers was dramatic. Their case management decisions have at least an equal effect on the civil justice process as does the court's own case management efforts.

The one fact that this evaluation has confirmed is that civil cases are rarely brought to conclusion by trial of the issues. This should also confirm that a refocus on the settlement of cases from the current focus on trial is appropriate. If participants in the system are to appropriately deliver services to the public, then it is logical that all preparation should be toward what is inevitably going to occur, a settlement.

VIII. RECOMMENDATIONS

There are certain things over which courts have no control, such as the conservative tendencies of the citizenry in some areas, like Berrien County, Michigan, that may cause insurance carriers to submit more cases to juries in those jurisdictions. This will present greater challenges for the judges in those venues as they work to manage the critical events of civil cases over which they do have control.

Well-managed cases are concluded at a faster rate than cases that are not managed. Scheduling orders are the key to managing cases. Not only is it important that judges issue scheduling orders, but they should be issued at an early stage of the case and address all aspects of the case. The issuance of the order sua sponte by the judge shortly after the answer is filed, as is done in the Berrien County Trial Court, is appropriate.

The scheduling order used by the Berrien County Trial Court is well-drafted. It includes references to all the events of lawsuits that are important to bring cases to final disposition. It is advisable, however, to incorporate enough flexibility into the order to make it easily modified or supplemented to accommodate variant subject matters and case types.

Simply issuing a scheduling order is not sufficient to cause a case to be well managed. Close scrutiny of the case file before issuance of the order is crucial to make the order effective. The order must appear to relate in all respects to the case if the attorneys and the parties are to give serious regard to it. If standard scheduling order provisions, for example, are inapplicable to a particular case, they should be stricken, even if by hand. Others may need to be added. By making these modifications, the parties will have confidence that the judge has carefully reviewed the file and is working with them on an ultimate disposition of the case. In certain cases, a

short conference call with the attorneys may be appropriate before the order is issued.

Dates set in the scheduling order, especially the trial date, should be changed only with reluctance and for good cause. The dates must be set carefully after a thorough review of the case file. All contingencies cannot be anticipated, but maintaining an established pace for cases is in the interests of the parties as well as the court.

The results of this evaluation indicate that simply inserting ADR into case preparation does not bring that case to conclusion sooner. ADR is, however, an effective case management tool. It must be used in conjunction with other tools and at an early stage. To be effective, it must be appropriate for the particular case.

The Berrien County Trial Court's experiment with an ADR joint settlement plan unfortunately was hindered by the inclusion in the ADR methods available to the parties of the late neutral evaluation that is required under MCR 2.403. The State of Michigan has not reconciled the successes of that procedure with its failures. Meaningful ADR at an early stage of the process will be difficult until that is done. Until those changes occur, the only option courts have is to require ADR to be completed before the MCR 2.403 Michigan Mediation late neutral evaluation is used. The MCR 2.403 evaluation should not be an ADR option. This is suggested in the Berrien County order, but not mandated. The adoption of the proposed rule, MCR 2.410, making all civil cases subject to ADR, will assist judges by providing them with specific authority to order ADR in civil cases. Attorneys are reluctant to venture voluntarily into areas where they have little familiarity. By using their powers, courts can assist the attorneys in identifying new and better ways to resolve their cases.

Attorneys also can provide feedback to courts on which methods of ADR are effective and why they are effective, and conversely, why others are not. Judges should meet regularly with key bar members to discuss these issues in an open and frank environment. The attorneys interviewed in this evaluation gave enlightening information on what works in the facilitative mediation area. Although not truly facilitative mediation in the sense that ADR professionals view that process, it is a mechanism that helps to conclude cases. Judges and the bar need to understand these differences. A new process may need to be identified and refined. Alternatively, mediation providers may simply need to be distinguished between those that are true facilitative mediators and those that are more directive facilitators in the negotiation process. ADR professionals should be a part of this analysis.

Finally, the Berrien County Trial Court must collect data and implement a system to evaluate its ADR programs. This evaluation concentrated on only one aspect of the ADR program in Berrien County, the rate at which civil cases are disposed. The evaluation was made difficult without the appropriate data having been collected. Items such as the type of ADR selected in the joint ADR settlement plans are not docketed and can be retrieved only from a review of the court files.

It is also important that the court evaluate its ADR providers. The court sponsored a training program, but did not follow up to identify whether the training was successful in providing mediators with appropriate skills. Information needs to be gathered that will allow the court to measure both attorney and litigant satisfaction with the mediators and the mediation process.

The resource, *Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Managers*, published by the National Center for State Courts, provides excellent suggestions on how data collection for an evaluation can be accomplished.[83]

Civil cases are not concluded by court action. This long-established belief has been confirmed by this study. Courts and attorneys need to focus on settling cases in a manner that will facilitate knowledgeable, speedy case disposition with maximum litigant satisfaction. The Berrien County Trial Court's project is a step in the right direction.

[83] *See generally* OSTERMEYER & KEILITZ, *supra* note 7.

APPENDIX

STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT—CIVIL DIVISION
CASE MANAGEMENT AND SCHEDULING ORDER

CASE: _____ v. _____

FILE NO: _____

DATE COMPLAINT FILED: _____

DATE ANSWER FILED: _____

APPEARANCES:
PL _____

_____

DEF _____

_____

STATEMENT OF CASE: This case involves _____

_____

_____

_____

CASE SCHEDULING DATES:

ADR Joint Settlement Plan Due _____

Joinder of Claims and Parties _____

Physical Examination _____

Experts: Disclose _____
Depose _____

Rebuttal Experts: Disclose _____
Depose _____

Witness lists filed, exhibits disclosed, and depositions purged: 28 days before settlement conference

Pretrial Motions: filed and heard before settlement conference

Expert witness fees exchanged: 14 days before settlement conference

General Discovery Deadline and Trial Briefs due: 28 days before trial

Jury Instructions and Jury Verdict Forms: filed and exchanged 28 days before trial

Settlement Conference _____

Trial: _____ Days _____ Jury _____ NJ

Set for: _____ at 8:30 a.m.

Other _____

PLEASE REFER TO SPECIFIC PARAGRAPHS IN ORDER FOR MORE DETAILED INFORMATION CONCERNING THESE DEADLINES.

_____ _____

Date Trial Court Judge

A. **ALTERNATIVE DISPUTE RESOLUTION:** Within 21 days of the issuance of this Order, a joint settlement plan shall be submitted by the parties which shall include the following provisions:

1. An indication of the type of early discovery necessary to provide meaningful settlement negotiations.
2. The time necessary to complete the early discovery, which time shall not exceed 77 days from the date of this Order.
3. A suggested method of Alternative Dispute Resolution (ADR). Alternative Dispute Methods include: arbitration; early neutral evaluation; facilitative mediation; mini-trial; summary jury trial; and any other fundamentally fair means agreed upon by the parties. These methods are described in more detail in ADR Summary attached to this Order.

Failure of the parties to agree upon a means of ADR shall result in the imposition of an ADR method selected by the Court.

B. **JOINDER OF PARTIES AND CLAIMS:** All parties and claims shall be joined no later than the date listed on page one. A party requesting joinder of another party shall be responsible for serving a copy of the Case Management and Scheduling Order upon the newly joined party contemporaneously with service of process. This Case Management and Scheduling Order shall be binding on the newly joined party unless that party moves to modify the Case Management Scheduling Order within 21 days of service of process upon that party.

C. **PHYSICAL EXAMINATION (Personal Injury Claim):** The right to a physical examination is reserved by the Defendant and is to be conducted as soon as possible, but not later than the date listed on page one. If the trial is significantly delayed, the Defendant's physician may have a refresher examination. The Defendant shall pay all costs of the examination including Plaintiff's reasonable traveling expenses and actual loss of wages. Upon receipt of the examining physician's report, the Defendant's attorney shall immediately provide a copy of the report to the Plaintiff's attorney. The Plaintiff, at Plaintiff's expense, may have discovery of the Defendant's physician at any time prior to trial.

D. **EXPERTS:** No later than the date listed on page one, all parties shall file with the Court and with every other party, the names, addresses, field of specialty and a brief summary of the expected testimony of their experts and they shall have until the date listed on page one to depose the same. Rebuttal or opposing experts shall be similarly identified not later than the date listed on page one and their depositions shall be completed by the date listed on page one. Any party may call another's expert(s). No other experts may be used other than as listed or provided for herein.

E. **PRE-TRIAL MOTIONS:** All motions, the basis for which is or should be known prior to trial, shall be filed, served and heard as soon as possible and **before the settlement conference.** A motion and supporting brief which complies with MCR 2.119(A) shall be filed and served not later than 28 DAYS prior to the scheduled hearing. A response and brief in opposition to the motion which complies with MCR 2.119(A), motion shall be filed and served no later than 18 DAYS prior to the scheduled hearing date. **SANCTIONS, INCLUDING BUT NOT LIMITED TO REJECTION OF THE LATE BRIEF AND IMPOSITION OF COSTS MAY BE IMPOSED BY THE COURT FOR FAILURE TO COMPLY WITH THE ABOVE-STATED TIME LIMITATIONS.**

F. **DISCOVERY:** Discovery not specifically referred to in this Case Management Scheduling Order, e.g., physical examination, may be conducted until 28 days prior to trial.

G. **EXPERT WITNESS FEES:** At least 14 days prior to the settlement conference, the attorneys must exchange statements of the reasonable, necessary and proper fees or rates of fees proposed to be paid to the expert witnesses, which may later be taxed as costs. If there is an objection regarding the fees or rates of fees to be paid, it must be raised and heard **prior to the settlement conference.** Fees or rates of fees not so exchanged 14 days prior to the settlement conference will not be allowed. Fees or rates of fees exchanged without timely objection shall be allowed should costs be awarded.

H. EXHIBITS AND DEPOSITIONS: If admissibility is not agreed upon, the attorneys must meet at least 14 days before the settlement conference and disclose all exhibits and depositions proposed to be offered and agree on admissibility. If an issue regarding admissibility remains, the issue shall be heard by the Court **prior to the settlement conference.** Any objection not so raised and heard shall be deemed waived including those made in depositions, which shall be purged from the record by counsel before trial. Prior to the commencement of trial, each attorney shall have all proposed exhibits marked for identification by the courtroom clerk and shall furnish the Court and opposing counsel with a list briefly describing the proposed exhibits. Exhibits and depositions not so exchanged will not be admitted. If an objection consistent with this Order is not made timely, the exhibit or deposition shall be admitted into evidence.

I. POSSIBLE WITNESSES: A list of all possible witnesses shall be exchanged and filed 28 days prior to settlement conference.

J. TRIAL BRIEFS: On facts and legal issues in dispute, are to be filed and exchanged 28 days prior to trial.

K. JURY INSTRUCTIONS AND VERDICT FORMS: All jury instructions and proposed verdict forms are to be filed and exchanged 28 days prior to trial. JURY INSTRUCTIONS AND JURY VERDICT FORMS ARE TO BE TYPED COMPLETED, INCLUDING ALL BLANKS AND CHOICES, and also identified by SJI 2d number. It is not necessary that each instruction be on a separate sheet of paper. (An additional copy of the completed instructions on a floppy disk for filing with the Court is requested.)

L. SETTLEMENT: All parties shall immediately engage in substantial and good faith efforts to settle this case and shall notify the Court immediately if settlement is reached.

M. SETTLEMENT CONFERENCE: To be held on the date listed on page one. All trial counsel and the party(ies) with ACTUAL AUTHORITY TO SETTLE the case SHALL BE PERSONALLY PRESENT for the settlement conference.

N. ADDITIONAL PROVISIONS: A party may request a pre-trial conference if necessity for the same is shown or the Court may, on its own motion, order such additional pre-trial conference or conferences as it may deem necessary from time to time. Any correction or objection to the Case Management and Scheduling Order shall be filed and noticed for hearing not later than 14 days after the date of mailing this Order. A party may seek relief from this Order for good cause shown by timely filing a motion for same and a request for hearing in person or in an emergency, with permission of the Court, by telephone conference.

Alternative Dispute Resolution (ADR) Methods

In addition to evaluative mediation under the Michigan Court Rule 2.403, the following methods of Alternative Dispute Resolution (ADR) may be utilized:

A. Arbitration. A forum in which each party and their counsel present their position and evidence before a neutral third-party (or panel) who renders a specific, binding award.

B. Early Neutral Evaluation. A forum in which attorneys present the core of the dispute to a neutral evaluator or a panel of evaluators in the presence of the parties. This occurs after the case is filed but before discovery is conducted. The neutral or panel then give a candid assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.

C. Facilitative Mediation. A forum in which a neutral third-party facilitates communication between parties to promote settlement. The mediator may not impose his or her own judgment on the issues for that of the parties.

D. Mini-Trial. A forum in which each party and their counsel present their position, either before a selected representative for each party or before a neutral third-party, or both, in order to define the issues and develop a basis for realistic settlement negotiations. A neutral third-party

may issue an advisory opinion regarding the merits of the case. The neutral's opinion is not binding, unless the parties have agreed by written stipulation that it will be binding.

E. Summary Jury Trial. A forum in which each party and their counsel present a summary of their position before a panel of jurors. The number of jurors on the panel is typically six, unless the parties agree otherwise. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

F. Other Methods. The parties are not prohibited from initiating some other method of dispute resolution including some form of facilitative mediation combined with arbitration; or a form of summary jury trial in which the parties agree to make the award/verdict binding within the limits of a high-low agreement; or any other method of dispute resolution that comports with fundamental fairness and is mutually agreeable to all parties to the dispute.

Nothing in this Order shall be construed to prohibit the parties from agreeing to one of the methods defined above or to another method of dispute resolution. Nothing in this Order shall be construed to prohibit the presiding judge in a civil action from calling additional ADR conferences, as necessary, to assist the parties in the formulation or implementation of an ADR method appropriate to the case.